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NULLITY OF THE EMANCIPATION EDICT.

I HAVE been greatly interested in an article in the February number of the "North American Review," by President Welling, on the Emancipation Proclamation. It presents the subject with great ability and fullness of detail, and, as far as my memory goes, it is the first article in an American periodical that has taken up the subject upon principle.

The proclamation is a past matter—was superseded by the amendment to the Constitution abolishing slavery—and it may be asked why its character and effect need now be inquired into. But it presents a great figure in history, and at the time it was issued it was supposed by many to have abolished slavery throughout the Union; and, doubtless, a great number are still of that opinion, and the pen with which it was signed is preserved as a pious relic. It is never right to allow a mistake to exist upon an important political act, and I know of none in our history about which there has been so much misconception. The proclamation presents no question of constitutional law. It is to be looked at only with reference to the nature of things, and to that universal public law which must always coincide with the nature of things. If what the proclamation assumed to do could be done at all, I see no constitutional objection to its being done by the President, as commander-in-chief, in the absence of an act of Congress. But what it assumes to do is something which neither the President, nor Congress, nor the whole people of the loyal States, by an amendment of the Constitution, or in any other manner, could have effected.

This strong statement justifies a demand for a careful examination of the proclamation. There is no difficulty, it seems to me, in its construction. The vital passage reads as follows: "By virtue of the power in me vested as commander-in-chief of the army and navy of the United States in time of actual armed rebellion against

the authority and Government of the United States, and as a fit and necessary war measure, . . . I do order and declare that all persons held as slaves within said designated States are, and from henceforth shall be, free; and that the Executive Government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons." The States and parts of States which the President designates in the proclamation were those which were beyond our military occupation and control, and he makes his proclamation in terms applicable only to such.

To fully understand the application of the proclamation, we must remind ourselves how the country then stood. The Southern States were not in the attitude of an insurrection for redress of grievances, or of rebellion against particular laws. They had declared their absolute independence of the United States, and were engaged in war against the United States for the maintenance of that independence. Whether that independence stood or fell, was to be determined by the result of the war. They had organized a confederate republic, with armies against which our powers had availed but little, and with a marine which gave us great trouble at sea. The final result of the war was then doubtful, depending in some measure upon the course which should be taken by the great states of Europe with respect to the recognition of independence. Our Government fully recognized a state of belligerency between the two powers, and we accepted and acted upon the rules which prevail in public war. As the act done by the President was professed to be done solely as "a war measure," by virtue of the powers vested in him "as commander-in-chief," and as the region upon which it was to operate was a region beyond our military occupation and control, and declared to be within that of the enemy, the only question that we need ask is whether a commander-in-chief can effectually do such an act, under such circumstances. Let us return to the proclamation. It is not a military order to take effect in the future. It is an edict purporting to operate from the time it is given out, and to operate *proprio vigore*. The slaves "are" free. Its only reference to the future is a promise that those slaves shall continue free "from henceforth," and "that the Executive Government of the United States, including the military and naval authorities thereof, will"—not create and confer, but "recognize and maintain the freedom of said persons."

We may therefore treat the proclamation as an edict purport-

ing to operate, by its own force and from the time of its signature, the actual emancipation of all existing slaves beyond our military control and occupation. It did not affect to operate at all upon slaves within our military control. On the contrary, it studiously excludes them, reserving, in its designation of the regions upon which it is to operate, those counties in the rebel States of which our armies had obtained control. It must be also remembered that at this time several of the border slave States were in the Union, their senators and representatives being in Congress, their slave Constitutions respected, the right of loyal masters to their slaves sustained, and that slavery was not abolished in the District of Columbia nor the fugitive-slave law repealed; and more than a year after this time an act of Congress (February 24, 1864) gave to the loyal master the one hundred dollars bounty for the slave which should be enlisted in the army, and assumed to pay every loyal owner of a colored volunteer in a loyal slave State a compensation of three hundred dollars, and this provision was to retroact, and this act had, of course, the approval of the President.

To show how completely the proclamation was assumed to effectuate emancipation from its date, the President enjoins upon all persons so enfranchised to abstain from all violence, unless in case of necessary self-defense, and recommends them in all cases, when demanded, to "labor faithfully for reasonable wages."

The rules of universal public law give to an invading conqueror certain powers over such territory of his enemy as he holds with a certain degree of military occupation and control. Among these powers is one respecting the emancipation of such slaves as are within that territory, and under his military control. It is not necessary to inquire nicely what kind and degree of occupation and control are required to bring these powers into force, because the proclamation is confined to territories beyond our control, and designated as within the control of the enemy. And for the same reason it is not necessary to inquire nicely into the limits of the powers of the conquering invader over the slaves in question. It is sufficient to say that this proclamation assumes to give them immediate and absolute emancipation, in spite of the condition or vicissitudes of the war. It is also sufficient for our purpose to say that no emancipation of slaves can be effected under the war power, except upon the condition of successful occupation. It is not necessary to cite any authorities for such a point. War is a contest of force, and nothing can be done under the war powers of any gov-

ernment which is not effected and sustained by force. The same reasoning applies to the Czar of Russia as to the President or the Congress. The Czar, by his edict, freed every serf in Russia; but even he, whose will is law, could not have emancipated a serf in his enemy's occupation. The proclamation was in the nature of legislation, an edict professing to rest upon war powers; but the thing it undertook to do can not be done in that way. It may be done by adequate force, subject to the contingencies of war, but it can not be done by anything which is a mere expression of will, even if that will be the will of an absolute sovereign. It was our policy to close all the Southern ports to foreign trade. It is surprising to remember how many persons thought at first that that could be effected by an act of Congress, and had to be taught that legislation could effect nothing beyond the line of bayonets, and that we could only close the ports by a blockade. So as to all other attempts to substitute will for force in an actual war. No one supposed the President could decree a victory, or proclaim territory to be within our military control and subject to our authority, which was not so in fact. Yet it is somewhat surprising to see how general has been the misapprehension respecting the character and effect of this proclamation. But, on further consideration, it is not matter of so much surprise. This leads us to revert to the state of things at that time, so well set forth by President Welling.

The border slaveholding States in the Union required careful treatment, and received great consideration. The President thoroughly adopted their policy, the object of which was to restore the Union without affecting slavery. In the free States there was a large political party supporting this policy, which, acting with the border slave States, it was feared might at any time obtain the control of Congress, and make a peace favorable to slavery. While this policy was in the ascendant we made little progress, suffered great reverses, and the public mind was in great agitation. The opinion increased rapidly that slavery was the real question at issue; that it formed the strength and gave the materials to the enemy, and was the one thing that held them closely together—more closely than anything could hold the North together, unless it should be a determination to destroy slavery under the military power. President Welling has described how great was the "pressure" which was brought to bear upon the President in this direction, and how deeply it affected him. We all remember that what was demanded was a change of the policy of the war from the Ken-

tucky policy to the Massachusetts policy; from that of the border slave States and what may be called the border politicians in the free States, to that of the people who believed that nothing could be done effectually until we took hold upon slavery.

To this pressure the President yielded and issued the proclamation. Was this proclamation what was expected? It seems, from President Welling's quotations, that Mr. Chase, who had been most earnest for the change of policy, had limited his expectations by the rules of public law, and looked only for a military order which should carry emancipation wherever the flag went, and was surprised at the position taken. Mr. Seward seems to have favored practical emancipation, but to have opposed a proclamation. From Mr. Welles's letters, it is plain that he did not advise it. It would seem, therefore, that in this, as in many other cases, the Cabinet was not consulted. I believe that, if the President had issued a proclamation in the form of a military order, requiring all slaves to be emancipated as fast and as far as the flag advanced, and pledging to the emancipated slaves our utmost efforts to secure them in their freedom, and if he had expressed it with that power and pathos of language of which the untutored Abraham Lincoln was a master, it would have answered the expectations of the country, given him the just fame of a liberator, and raised no question under public law.

I remember that, after the preliminary proclamation of the 22d of September, 1862, I had an interview with Mr. Sumner upon the subject, just before his return to Washington. It was plain that the final proclamation was to come, and I feared, from the preliminary, that it would take the form it did. I presented to him substantially the objections which are now made, but I could not secure from him a serious consideration of the objections. He was under great excitement, and, it seemed to me, was under the impression that there was a necessity overruling all other considerations for freeing all the slaves in the country, and that the proclamation would give them the status of freedom. I can not but think that if Mr. Pierce shall continue his biography to the year 1863, we shall have more light than we now have as to who is responsible for the position taken in the proclamation, and for the pressure which led to its adoption. It is plain that Mr. Lincoln himself, in urging afterward the adoption of the amendment to the Constitution abolishing slavery, doubted the effect of his proclamation. A more careful examination of those biographies and letters which have

lately been brought to light may show whether he was not subject to the same doubts at the time he issued it. I talked with Mr. Seward on the subject after the proclamation appeared, but he made no explanation, and when I asked him why, if it was simply a war measure by the commander-in-chief, he countersigned it as Secretary of State, he replied that that was a compromise, not saying between whom or what, and I did not pursue the subject.

The slaves of the South seem to have made no mistake as to their status. They knew they were not free while their masters held them and the territory. They looked to the gunboats and the Stars and Stripes, and regarded the proclamation only as a promise which would fail or be made good according to the issue of the war. As to the people of the North, they were in no humor to "reason too precisely upon the event." They were impatient under the existing policy, and looked for a change. They saw that change in the proclamation, and cared little in what form it came or what else it undertook to do. They had been disgusted by the advice that had been offered them on constitutional questions by over-technical or semi-loyal men. Jurists had advised that the prize courts were unconstitutional, that no property could be taken, at sea or on land, except in the way of penalty for treason, after a jury-trial; that we could not blockade our own ports; that though an army and a militia were constitutional, volunteers and conscriptions were not; and, at the bottom of all, that the republic could not coerce a State. It is little wonder, therefore, that they were impatient of any criticism upon the proclamation. On the other hand, unquestionable patriots, educated in a narrow school of strict construction —chief among whom was Mr. Thaddeus Stevens—were telling the people that the only way to save the Union was to run the Constitution ashore; and, to ease the conscience of doubters, the phrase "*extra constitutional*" was invented—a phrase which, in logic, meant nothing, and was never heeded by men who studied the Constitution in the light of the letters of "The Federalist," the judgments of John Marshall, the essays of Story, and the speeches of Webster.

Fortunately, the proclamation was never brought to a test. There can be little doubt that foreign states and our own judiciary would have treated it as ineffectual. When the Southern armies surrendered and dispersed, and the Confederate Government had fallen through and was abandoned, and we were in military occupation of all the strongholds of what had been, in the sense of the laws of

war, enemy territory, we were competent, under the rules of war, to emancipate every existing slave. And no doubt the proclamation of January 1, 1863, though such were not its terms, brought about a system of progressive military emancipation, taking effect as we advanced. But for the prohibition of slavery thereafter in the conquered States, under their Constitutions, as well as in the loyal States, very different action was required. The abolition of the slave system, as it stood in the Constitutions of so many States, was beyond the reach of the mere military power of the President or of Congress. It called for the ultimate, sovereign legislative action of "we, the people of the United States," in the form of an amendment of the Constitution; and this, when adopted, precluded all question as to attempted past emancipation or abolition by proclamation.

I should regret extremely if what I have felt obliged to say should lead any one to think me disposed to join in attempts to detract from the fame of Abraham Lincoln. I never failed to sustain his Administration, when at one time the conservatives, and at another the radicals, stood in threatening or dubious attitudes. His fame as a statesman, an orator, and a liberator, as a man of kind heart and serious thought, is established. Nothing can be added to it by fiction, and it would be simply fiction to represent to the people that the proclamation, as conceived and issued, abolished slavery or emancipated a slave. Knowing, as all do, of the powers of Mr. Lincoln's mind and the sincerity of his purpose, we can not but earnestly desire that further research may furnish satisfactory explanations of what is now a curiosity of history.

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